Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

**VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE, NANCY SMITH and JAMES P. BATEMAN,**

*Cross-Petitioners,*

v.

**MARY E. HOGAN, COLE TAYLOR BANK, as Trustee Under Trust No. 77-432 dated December 19, 1977, SAM LOIACONO, RUTH LOIACONO, and LAKE BARRINGTON INDUSTRIAL PARK ASSOCIATION,**

*Cross-Respondents.*

**On Cross-Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District**

## CROSS-PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Illinois Appellate Court improperly refused to clothe Cross-Petitioner, Lake Barrington Village Attorney, James P. Bateman, with official, qualified immunity.

A. Whether, in the first instance, the Petitioners/Cross-Respondents adequately pleaded the deprivation of their right to petition the Court for redress of grievances.

B. Whether, in refusing to extend official immunity to Cross-Petitioner, Lake Barrington Village Attorney James P. Bateman, the Illinois Appellate Court erred by applying a subjective test, as opposed to a purely objective one, in contravention of this Court's decision in *Harlow v. Fitzgerald*.

## PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the Appellate Court of Illinois.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW .... | i |
| PARTIES TO THE PROCEEDINGS ..... | ii |
| INDEX TO CROSS-APPENDIX ..... | iv |
| TABLE OF AUTHORITIES ..... | v |
| OPINIONS BELOW ..... | 1 |
| JURISDICTIONAL STATEMENT ..... | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... | 4 |
| STATEMENT OF THE CASE ..... | 5 |
| ARGUMENT: | |
| THE ILLINOIS APPELLATE COURT IMPROPERLY REFUSED TO APPLY TO VILLAGE ATTORNEY JAMES BATEMAN OFFICIAL, QUALIFIED IMMUNITY ..... | 11 |
| CONCLUSION ..... | 25 |

## INDEX TO CROSS-APPENDIX

(Reports of decisions and opinions delivered)


| | APP. PAGE |
|---|---|
| First Amended Counter-Complaint and Third-Party Complaint of Cross-Respondents, filed July 28, 1993 | 1 |
| Motion to Dismiss First Amended Counter-Complaint and Third-Party Complaint of Cross-Petitioner James P. Bateman, September 10, 1993 | 16 |
| Order of the Circuit Court of Lake County, Illinois, Granting the Cross-Petitioners' Motion to Dismiss Count I of First Amended Counter-Complaint and Third-Party Complaint, November 24, 1993 | 27 |

## TABLE OF AUTHORITIES


| *Cases* | PAGE |
|---|---|
| *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987) | 18, 19 |
| *Azeez v. Fairman*, 795 F.2d 1296 (7th Cir. 1986) | 20 |
| *Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986) | 20 |
| *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 371, 103 S.Ct. 2161 (1983) | 22 |
| *Burns v. Reed*, 44 F.3d 524 (7th Cir. 1995) | 18 |
| *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972) | 21 |
| *Colaizzi v. Walker*, 812 F.2d 304 (7th Cir. 1987) | 20 |
| *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983) | 12, 15 |
| *Davis v. Scherer*, 486 U.S. 183, 104 S.Ct. 3012 (1984) | 17, 18 |
| *Gregorich v. Lund*, 54 F.3d 410 (7th Cir. 1995) | 18 |
| *Harlow v. Fitzgerald*, 475 U.S. 800, 102 S.Ct. 2727 (1982) | 11, 17, 18, 23 |
| *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318 (1972) | 15 |
| *Local No. 438 Construction and General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542, 83 S.Ct. 531 (1963) | 3 |
| *Lojuk v. Johnson*, 770 F.2d 619 (7th Cir. 1985) | 18, 19 |
| *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787 (1985) | 12 |
| *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985) | 3, 23 |

*Monarch Entertainment Bureau, Inc. v. New Jersey Highway Authority*, 715 F.Supp. 1290 (Dist. Ct. N.J. 1989) ..... 21

*Phares v. Gustafsson*, 856 F.2d 1003 (7th Cir. 1988) ..... 12

*Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 88 S.Ct. 1731 (1968) ..... 12

*Reichenberger v. Pritchard*, 660 F.2d 280 (7th Cir. 1981) ..... 14, 15

*Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789 (1991) ..... 11

*Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2nd Cir. 1968) ..... 21

*Yatvin v. Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988) ..... 12, 14, 21

*Constitutional and Statutory Provisions Involved*

U.S. Const., Amend. I ..... 4

35 ILCS §235/9 (1982) ..... 4, 7

42 U.S.C. §1983 ..... 5, 9, 15

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**On Cross-Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District**

## CROSS-PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The Order of the Circuit Court of Lake County, Illinois granting the Cross-Petitioners' Motion to Dismiss Count I of the First Amended Counter-Complaint and Third-Party Complaint for money damages (brought under 42 U.S.C. §1983) on the basis that the Village's Complaint constituted protected petitioning activity, under the

*Noerr-Pennington* doctrine, which did not constitute "sham" litigation, was entered on November 24, 1993, is unreported, and is reprinted at Page 27 of the Cross-Appendix to this Cross-Petition.

The Order of the Illinois Appellate Court, Second Judicial District, reversing the decision of the Circuit Court of Lake County, Illinois, was entered on May 2, 1995, is reported at 272 Ill. App. 3d 225, 649 N.E.2d 1366, 208 Ill. Dec. 705, and is reprinted at Pages 1 to 22 of the Petitioners' Appendix.

The Order of the Illinois Appellate Court, Second Judicial District, denying the Cross-Petitions of the parties for rehearing was entered on June 9, 1995, is unreported, and is reprinted at Page 23 of the Petitioners' Appendix.

The Order of the Illinois Supreme Court, denying the petition for leave to appeal was entered on October 4, 1995, is reported at 163 Ill.2d 560, 657 N.E.2d 623, 212 Ill. Dec. 422, and is reprinted at Page 24 of the Petitioners' Appendix.

## JURISDICTIONAL STATEMENT

The Cross-Petitioner, Lake Barrington Village Attorney, James P. Bateman, invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257. The Illinois Appellate Court, Second Judicial District, reversed the dismissal order entered by the Circuit Court of Lake County, Illinois, in favor of the Cross-Petitioner and that order reversing was entered on May 2, 1995. The Illinois Supreme Court denied the Cross-Petitions of the parties for leave to appeal on October 4, 1995. The Petitioners/

Cross-Respondents filed their petition for writ of certiorari within ninety days of the denial of the petition for leave to appeal in the Illinois Supreme Court.

The Cross-Petitioner received a petition for writ of certiorari on January 4, 1996. Pursuant to Supreme Court Rule 12.3, this Cross-Petition is timely, as it is filed within thirty days after receipt of the original petition for writ of certiorari.

Although 28 U.S.C. §1257 vests this Court with jurisdiction over appeals from only "final judgments or decrees" rendered by the highest court of a state in which a decision could be had, the Cross-Petitioner properly invokes the jurisdiction of this Court under the collateral order doctrine, as applied by this Court in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985). This Cross-Petition raises only the question of the improper denial of official, qualified immunity, which is an immunity from suit and which is effectively lost if the case is erroneously permitted to go to trial. Therefore, the Illinois Appellate Court's decision, insofar as it refused to clothe the Cross-Petitioner, Lake Barrington Village Attorney, James P. Bateman, with official, qualified immunity, is a "final" decision within the meaning of 28 U.S.C. §1257. *Local No. 438 Construction and General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542, 83 S.Ct. 531 (1963). The collateral order doctrine is applied not merely as a matter of procedure, but of substance, for the immunity would be extinguished if the case were erroneously permitted to go to trial.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Constitution of the United States, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the People to peaceably assemble, and to petition the government for a redress of grievances.

### 35 ILCS §235/9 (1982).

**Petition by 51 percent of electors of area—objection to district, enlargement of district, tax, etc.—subsequent proposals**

9. If a petition signed by at least 51% of the electors residing within the special service area and by at least 51% of the owners of record of the land included within the boundaries of the Special Service Area is filed with the municipal clerk or county clerk, as the case may be, within 60 days following the final adjournment of the public hearing objecting to the creation of the special service district, the enlargement thereof, the levy or imposition of a tax or the issuance of bonds for the provision of special services to the area, or to a proposed increase in the tax rate, no such district may be created, enlarged, or tax may be levied or imposed nor the rate increased, or no such bonds may be issued. The subject matter of said petition shall not be proposed relative to any signatories of said petition within the next two years. Each resident of the special service area registered to vote at the time of the public hearing held with regard to such special service area shall be considered an elector. Each

person whose name legal title to land included within the boundaries of the special service area is held according to the records of the county wherein the land is located shall be considered an owner of record. Owners of record shall be determined at the time of the public hearing held with regard to a special service area. Land owned in the name of a land trust, corporation, estate or partnership shall be considered to have a single owner of record.

**42 U.S.C. §1983**

**1983. Civil action for deprivation of rights.**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law; suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

This litigation arises out of the creation of a Special Service Area within the Village of Lake Barrington, Illinois. The proposed project consists of the installation of a potable water line system to service the area, together with a water supply and storage system, certain drainage improvements, and a sanitary sewer collection sys-

tem in an area known as the Lake Barrington Industrial Park ("Park"). The Park does not have sewer or municipal water, but is served by separate well and septic systems. Presently, the lack of a municipal water supply severely hampers the ability of the fire department to fight fires within the Park. Over the past several years, the fire department has had to fight several significant fires within the Park. In several instances, despite best efforts by the fire department and as many as twelve neighboring departments, the fire department was unable to prevent the fires from causing total losses of buildings and contents. This is due primarily to the lack of a municipal water supply for the Park. As a result, the fire department is forced to tank in water for firefighting purposes. This alternative is much slower, and prevents the fire department from putting enough water on the fire in a quick enough response to have a meaningful effect on the fire. In the opinion of Fire Chief Steven Figved, the installation of a municipal water system through the Special Service Area will significantly improve the ability of the fire department to put out fires within the Park. The system would also provide property owners with the opportunity to install sprinkler systems within their buildings, with a potential for significant reduction in their insurance premiums.

After two informational meetings were held, the Village adopted its first ordinance, on July 7, 1992, which established a public hearing date of July 29, 1992. Notice of the hearing was published in the Daily Herald on July 13, 1992, and, notice of the hearing was also mailed, by both First-Class and by certified mail, to the person or persons in whose name the general taxes for the preceding year had been paid, based on information provided by the County Treasurer's Office.

Cross-Respondent Ruth Loiacono, one of two persons in whose names the taxes had been paid for a single parcel within the proposed Special Service Area, contended that she was not mailed the notice, but she did not ever suggest that she did not see the notice, that she was not aware of the public hearing, that she did not attend the public hearing, or that she was in any way prejudiced by the alleged failure to mail her the notice. The notice was sent to the Loiacono's, and was signed for by her husband, Sam Loiacono. Ruth Loiacono filed a timely statutory objection to the Special Service Area.

The public hearing was held on July 29, 1992. After the hearing was adjourned, certain objections were filed, including the objections of Cross-Respondents Mary E. Hogan, Sam Loiacono and Ruth Loiacono. However, the objections had no legal impact on the proceedings, as they were insufficient in number to aggregate 51 percent of the owners and registered voters to prevent the creation of the Special Service Area, the levy of taxes, and the sale of bonds, as required under applicable Illinois law—Section 9 of the Special Service Area Tax Act (35 ILCS 235/9 (1982)). (Only 46 out 127 owners of record filed objections, and, only two of five registered voters signed objections).

Ultimately, the Village adopted an ordinance on October 20, 1992, which established the Special Service Area, consisting of 100 separate parcels and 127 owners of record. The Village adopted an ordinance on November 17, 1992, which provided for the levy of taxes and sale of bonds in the aggregate amount of $7,000,000.00. The Village entered into an agreement with Bernardi Securities, Inc. for the sale of the bonds on November 17, 1992.

The sale of the bonds was never completed. The Village Attorney, James P. Bateman, received a series of communications from an attorney, James Hecht, who claimed to represent Cross-Respondent, Mary E. Hogan, and other undisclosed clients. During a December 3, 1992 telephone conversation, Hecht told Bateman that he was preparing a suit to enjoin the sale of the bonds. On December 9, 1992, during another telephone conversation, Bateman informed Hecht that his threat of litigation was holding up the bond sale closing, which had been set for December 14, 1992. This threatened litigation prevented the Village from closing on the sale of the bonds on December 14, 1992. On December 18, 1992, Bateman spoke on the telephone again with Hecht, who was told that his threat of litigation was interfering with the ability of the Village to close on the sale of the bonds, since the Village could not represent to bond counsel that there was no pending or threatened litigation. In that conversation, Hecht denied that he had threatened litigation. Bateman then sent a letter to Hecht on December 21, 1992, to confirm this statement.

On December 22, 1992, Bateman and bond counsel, Charles Hug, had a telephone conversation with Hecht, in which he refused to confirm his earlier denial that the Cross-Respondents had threatened or were threatening suit. The sale of the bonds never closed. The Village contends that the closing was prevented by the consistent threat of litigation by Hecht, on behalf of Mary E. Hogan and certain other, undisclosed clients.

The Village of Lake Barrington has expended in excess of $645,568.00 for the proposed Special Service Area, including $396,681.00 for engineering services and $96,366.00 for administrative services and costs.

On January 5, 1993, the Village of Lake Barrington filed suit against Mary E. Hogan, Sam Loiacono, Ruth Loiacono, and other unknown owners. The Village's Complaint was dismissed by the Circuit Court, but the Village filed an Amended Complaint consisting of three counts, pursuant to leave of court. Count I sought a declaration of the validity of the Special Service Area ordinances. Count II was a claim for tortious interference with contract, and Count III was a claim for tortious interference with prospective advantage. The Circuit Court dismissed Counts II and III of the Village's amended complaint with prejudice.

The Cross-Respondents then filed a two-count Counter-Complaint and Third-Party Complaint, with both counts being brought under 42 U.S.C. §1983 for damages for alleged violation of their First Amendment right to petition and for violation of their rights protected under the equal protection clause of the Fourteenth Amendment. Ultimately, the Circuit Court dismissed the Cross-Respondents' First Amendment claim, as alleged in Count I of their First Amended Counter-Complaint, and, the Circuit Court later entered summary judgment in favor of the Cross-Petitioners on the equal protection claim. Although Village Attorney Bateman had filed his motion to dismiss the Cross-Respondents' First Amended Counter-Complaint and Third-Party Complaint on the basis of official, qualified immunity, the Circuit Court, in dismissing the Cross-Respondents' First Amendment claim, never addressed the issue of Attorney Bateman's entitlement to official, qualified immunity from suit brought under 42 U.S.C. §1983. The Cross-Respondents also filed a separate Counter-Complaint in which they sought a declaration that the Special Service Area ordi-

nances were invalid. On March 30, 1994, the Circuit Court entered summary judgment in favor of the Cross-Respondents on their action for declaratory relief, with the Circuit Court finding that the notice mailed by the Village did not satisfy the applicable statute for service upon individual owners, and the Circuit Court found that the notice was insufficient in content, without specifying any particular defect.

On cross-appeals by the parties, the Appellate Court affirmed, in part, and reversed, in part. At issue in this Cross-Petition is Count I of the Cross-Respondents' First Amended Counter-Complaint and Third-Party Complaint for deprivation of their First Amendment right to petition the court for redress of grievances. In Count I, the Cross-Respondents alleged that, at some time prior to December 9, 1992, Attorney Hecht advised Village Attorney Bateman that a suit would be filed to contest the validity of the Special Service Area ordinances, and that, thereafter, Mr. Bateman, acting in conspiracy and combination with Village President Nancy Smith, advised Mr. Hecht that if his clients sought a judicial determination of the validity of the Special Service Area ordinances, then Bateman was authorized by Smith and the Village to file an action for damages against the Cross-Respondents. Allegedly, in response to Bateman's threat to file suit, the Cross-Respondents decided to take no action to ascertain the validity of the Special Service Area ordinances. On January 5, 1993, the Village commenced this litigation by filing its Complaint for declaratory relief, seeking a declaration of the validity of the Special Service Area ordinances, and for damages for tortious interference with contract and tortious interference with prospective advantage.

In its opinion reversing the Circuit Court, the Illinois Appellate Court ruled that Village President Nancy Smith was clothed with official, qualified immunity from suit for money damages on the Cross-Respondents' claims of deprivation of their First Amendment rights. However, the Illinois Appellate Court ruled that the same official immunity should not be extended to James P. Bateman, the Village Attorney. In reversing the Circuit Court, the Illinois Appellate Court also held that the Village's claims for tortious interference with contract and for tortious interference with prospective advantage constituted "sham" litigation.

## ARGUMENT

### I.

### THE ILLINOIS APPELLATE COURT IMPROPERLY REFUSED TO APPLY TO VILLAGE ATTORNEY JAMES BATEMAN OFFICIAL, QUALIFIED IMMUNITY.

### A.

In *Harlow v. Fitzgerald*, 475 U.S. 800, 102 S.Ct. 2727 (1982), this Court held that "government officials performing discretionary functions, generally are shielded from liability from civil damages insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known". (*Id.*, 475 U.S. at 818, 102 S.Ct. at 2738). However, before addressing the question of whether the constitutional right at issue is clearly-established, the threshold inquiry is whether the plaintiff has alleged the violation of a constitutional right at all. *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789 (1991).

The Illinois Appellate Court improperly concluded, without any level of scrutiny, that the Cross-Respondents had sufficiently pleaded an actionable claim for deprivation of their First Amendment right to petition the courts, as a result of Village Attorney Bateman's threat to file a claim for damages against them.

This Court has observed that the First Amendment right to petition the government for redress of grievances is "cut from the same cloth as the other guarantees [of the First Amendment], and is an assurance of a particular freedom of expression". *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 2789 (1985). Thus, courts must analyze an alleged violation of the petition clause "in the same manner as any other alleged violation of the right to engage in free speech". *Phares v. Gustafsson*, 856 F.2d 1003, 1009 (7th Cir. 1988). The mere filing of a lawsuit is not necessarily and always protected by the First Amendment. *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988).

In deciding whether the Cross-Petitioner had wrongfully deprived the Cross-Respondents of any protected right to petition the government, the first inquiry must be whether the petition touched upon a matter of public concern, by looking at the content, form and context of the given statement, speech or petition. See, *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 1690 (1983). If the speech or petition can be fairly characterized as addressing a matter of public concern, then one proceeds to the *Pickering* balance test to determine whether the interest of the governmental entity outweighs the Cross-Respondents' First Amendment rights. *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 88 S.Ct. 1731 (1968). The Cross-Respondents

do not mean to suggest that the same level of scrutiny should apply when a governmental entity allegedly seeks to regulate speech or conduct of the citizenry in general, compared to when it acts in its capacity as an employer. The point is that, if the Cross-Respondents' petition to the Court did not address matters of public concern, then they have alleged no deprivation of any First Amendment right.

In the case at bar, there can be no scrutiny of the content of the petition which the Cross-Respondents threatened to file against the Village, as there was no allegation in the Amended Counter-Complaint that Attorney Hecht had ever provided Village Attorney Bateman with a copy of the threatened petition, and there is no allegation that Hecht had ever informed Village Attorney Bateman of the content of, or basis for, the Cross-Respondents' petition. There was no allegation that the Cross-Respondents' threatened complaint/petition would have contained the advancement of political ideas or would have contained claims of official graft, corruption, malfeasance, or the like. Taking into account the context of the discussions in which Attorney Hecht had threatened to file suit, and taking into account the timing of that threat to file suit, it was reasonable for Village Attorney Bateman to conclude that the point of the Cross-Respondents' threat to file suit was made only to prevent the Village from closing on the sale of the bonds, in order to protect their own private interests, as property owners within the Special Service Area, apparently because they did not want to incur the property tax increases resulting from the creation of the Special Service Area. It was also reasonable for Village Attorney Bateman to conclude that the Cross-Respondents' threatened lawsuit would have

been a baseless one, at least in the sense that the Village had passed a lawful ordinance which created a valid Special Service Area. (Even though the Illinois Appellate Court has ruled that the Loiacono parcel must be excluded from the Special Service Area, the Cross-Respondents' threatened suit to attack the validity of the creation of the entire Special Service Area). One has no constitutional right to file baseless litigation. *Yatvin v. Metropolitan School District, supra*, 840 F.2d at 419.

Applying an appropriate balancing test, even if one were to conclude that the Cross-Respondents' threatened lawsuit would have addressed matters of public concern, it is clear that the Village was acting to protect the contract for the sale of $6,000,000.00 in bonds and to protect in excess of $450,000.00 in expenditures for engineering services, administration costs, bond printing costs, and the like. The Village had a substantial interest in protecting the public treasury and the interests of its taxpaying citizens, relative to the substantial sums that had already been expended. Moreover, relative to Village Attorney Bateman's statement that he was authorized to file a claim for damages against the Cross-Respondents, in response to their threat to file a lawsuit contesting the validity of the Special Service Area ordinances, the Cross-Respondents had no constitutional right to be unopposed in their lawsuit, nor did they have any constitutional right to be free from a counterclaim for damages. *Reichenberger v. Pritchard*, 660 F.2d 280, 285 (7th Cir. 1981).

The Cross-Respondents failed to allege any facts in their First Amended Counter-Complaint tending to establish that there has been any actual, objective, chilling effect on their speech or other protected activities, as

a result of Village Attorney James Bateman's statement that he was authorized by the Village to file an action for damages against them. Absent a showing of objective harm or a specific, threatened, future harm, any claimed chill is merely subjective, and therefore, not actionable. *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 2325-26 (1972). Absent the pleading of any specific adverse effects, the "chill" claimed by the Cross-Respondents is merely subjective. The mere possibility of a remote or speculative future injury or invasion of rights will not suffice to state a claim under 42 U.S.C. §1983. *Reichenberger v. Pritchard*, *supra*, 660 F.2d at 285. The facts asserted in the Cross-Respondents' Amended Counter-Complaint simply failed to set forth how, if at all, the Cross-Respondents' expressive, political or business activities were interrupted by Mr. Bateman's statement that the Village had authorized him to file an action for damages against them.

In its opinion, the Illinois Appellate Court simply assumed that the Cross-Respondents had adequately pleaded a claim for deprivation of their First Amendment rights. The Illinois Appellate Court was bound to apply some reasonable level of scrutiny to the Cross-Respondents' alleged deprivation of their First Amendment rights, inasmuch as the *Pickering* balance test requires full consideration of the government's interest in effective and efficient fulfillment of its responsibilities to the public. *Connick v. Myers*, *supra*, 103 S.Ct. at 1692. Just as importantly, the Illinois Appellate Court failed to address the issue of whether the Cross-Respondents had sufficiently pleaded facts tending to establish that they sustained any actual, objective chilling effect on their right to petition. Had the Cross-Respondents wished to file a

complaint in the Circuit Court attacking the validity of the Special Service Area ordinances, then the claimed statements made by Village Attorney James P. Bateman did nothing to deprive the Cross-Respondents of adequate, effective, and meaningful access to the Court.

**B.**

In their First Amended Counter-Complaint, the Cross-Respondents alleged that Village President, Nancy Smith, and Village Attorney, James P. Bateman, acted in agreement, combination and conspiracy, to deprive them of their First Amendment right to petition the court.

The Illinois Appellate Court concluded that Village President Nancy Smith is entitled to qualified immunity. On the basis of that finding, the Illinois Appellate Court, *a fortiori*, determined that Ms. Smith's actions, as alleged in Count I of the First Amended Counter-Complaint, did not violate any clearly-established, constitutional right of the Cross-Respondents. Specifically, the Illinois Appellate Court stated as follows:

> "Governmental officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly-established statutes or constitutional rights of which a reasonable person would have known." (Citation omitted).
>
> . . .
>
> "Applying these standards, we find that a reasonable Village President would have relied on the advice of the Village Attorney that the course of conduct the Village was pursuing was proper and legal, and thus we find immunity applies to Smith. However, we find that in light of the pre-existing law the immunity does not extend to Attorney Bateman. Thus,

> we conclude that the trial court properly dismissed Count I of the Defendants' counterclaim as it pertains to Smith, but erred in dismissing that claim as it pertained to Bateman." (App., pp. _____).

Because Village President Smith is protected with official, qualified immunity from suit, Village Attorney Bateman must be clothed with the same immunity. If it were reasonable for Smith to conclude that the course of conduct that the Village was pursuing was legal, then it was reasonable for Village Attorney Bateman to reach the same conclusion. If Village President Smith violated no clearly-established right of the Cross-Respondents, then Village Attorney Bateman violated no such right.

As this Court observed, in *Davis v. Scherer*, 486 U.S. 183, 104 S.Ct. 3012, 3017 (1984):

> "*Harlow v. Fitzgerald, supra*, rejected the inquiry into state of mind in favor of a wholly objective standard. Under *Harlow*, officials 'are shielded from liability for civil damages insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known.' (Citation omitted). Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly-established law.' (Citation omitted). No other 'circumstances' are relevant to the issue of qualified immunity."

It matters not whether the purely objective standard of qualified immunity is applied to the President of the United States, the U.S. Attorney General, the Governor of Illinois, a judge, the President of the Village of Lake Barrington, or the Lake Barrington Village Attorney. The purely objective analysis is the same and the question is simply whether a reasonable official could have con-

cluded that his act violated no clearly-established statutory or constitutional right of the Plaintiffs. This Court has stated that the principal qualified immunity established by its decisions is to be applied "across the board". *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3042 (1987).

In reaching its decision, the Illinois Appellate Court has imposed a subjective analysis into the question of the qualified immunity defense, by finding that, because she is Village President, Nancy Smith is entitled to the immunity, but that, because he is an attorney, Village Attorney James P. Bateman is not entitled to be clothed with the same immunity. By adopting this analysis, the Appellate Court has contravened the long-standing, purely objective test established by this Court in *Harlow v. Fitzgerald*, *supra*, and its prodigy.

It is the Plaintiffs' burden to show that the Defendant's actions violated a right that was clearly-established at the time of the conduct at issue. *Davis v. Scherer*, *supra*, 104 S.Ct. at 3021. This standard requires a plaintiff to offer closely analogous case law or evidence that the Defendant's conduct is so patently violative of the constitutional right that reasonable officials would know of the violation without guidance from the courts. *Burns v. Reed*, 44 F.3d 524 (7th Cir. 1995). Government officials are not expected to be prescient, and they are not liable for damages simply because they legitimately, but mistakenly believe that the balancing of interests tipped in their favor. *Gregorich v. Lund*, 54 F.3d 410, 415 (7th Cir. 1995).

In order for the law to be considered "clearly-established", there must be "case law which *clearly* and *consistently* recognized the constitutional right". *Lojuk v. John-*

*son*, 770 F.2d 619, 628 (7th Cir. 1985) (emphasis added). One cannot make the broad, general statement that the First Amendment right to petition the courts was clearly-established. Both this Court and the Seventh Circuit have made clear that, if the constitutional right at issue is defined too broadly, the immunity would never be available. Rather, qualified immunity is fact-specific and fact-sensitive. In *Anderson v. Creighton*, *supra*, this Court stated:

> "It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly-established' in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful (citation omitted); but it is to say that in light of pre-existing law, the unlawfulness must be apparent." (*Id.*, 107 S.Ct. at 3039).

Even before *Anderson*, *supra*, in this Circuit, Judge Richard Posner had observed:

> "[The *Harlow*] test would have little bite if a right 'clearly-established' *at any level of generality* could survive it. The words 'clearly-established . . . constitutional rights' may not be used to read the defense of immunity out of federal tort law by the facile expedient of stating constitutional rights in the most general possible terms, so that anyone who prevails on the merits of a claim based on (for example) the First Amendment's free exercise of religion clause, however novel that claim is, can defeat the defense of immunity simply by pointing out that the right to the free exercise of one's religion has long been a clearly-

established constitutional right. The right must be sufficiently particularized to put potential defendants on notice that their conduct is probably unlawful." (*Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986). *Colaizzi v. Walker*, 812 F.2d 304, 307-308 (7th Cir. 1987)).

In the context of a First Amendment claim, whenever balancing of interests is required, "the facts of the existing case law must closely correspond to the contested action before the defendant official is subject to liability under [*Harlow*]". *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986). Therefore, "[Q]ualified immunity typically casts a wide net to protect government officials from damage liability *whenever balancing is required*", inasmuch as "the particularized balancing required by *Pickering* is difficult for even the judiciary to accomplish". *Id.*, 786 F.2d at 276 (emphasis added).

Thus, in the First Amendment setting, the court must take into account the totality of the circumstances and all of the facts pleaded, including what the Cross-Respondents and their attorney, Hecht, said and the form and context of those expressions.

It is submitted that it would have been objectively reasonable for any Village official to have concluded that the Cross-Respondents' motivations were purely personal, especially inasmuch as the time for mounting a legally sufficient objection to the Special Service Area ordinances, as prescribed by Illinois law, had elapsed, and inasmuch as the Cross-Respondents (through Hecht) threatened to file suit attacking the validity of the ordinances immediately prior to the date set for the bond sale closing.

At the second level of inquiry, it is submitted that it would have been objectively reasonable for any Village official to have concluded that, taking into account the vast, substantial sums that had already been expended by the Village and its tax-paying citizens, the Village had a substantial interest to protect. Moreover, it would have been reasonable for any Village official to conclude that the needed improvements and the substantial sums already expended therefor outweighed the purely private, personal motivation of the Cross-Respondents.

With respect to the context and form of the Cross-Respondents' threat to file suit to contest the validity of the Special Service Area ordinances and considering the timing of the Cross-Respondents' threat (i.e. after the statutory period for filing of objections had elapsed), any Village official could have reasonably concluded that the Cross-Respondents were merely threatening baseless, bad faith litigation, taking into account established law in this Circuit. *Yatvin v. Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988).

Taking into account the state of the law at the time of the acts alleged in the Cross-Respondents' First Amended Counter-Complaint, any Village official could have reasonably concluded that, as a local governmental body, the Village of Lake Barrington itself possessed the First Amendment right to petition the courts for redress of grievances under the *Noerr-Pennington* doctrine. *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972); *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2nd Cir. 1968); *Monarch Entertainment Bureau, Inc. v. New Jersey Highway Authority*, 715 F.Supp. 1290 (Dist. Ct. N.J. 1989).

At the time when the Village filed its complaint for declaratory relief and for damages, and at the time when Village Attorney James P. Bateman made the alleged threat to file that action, any Village official could have reasonably concluded that there existed a "reasonable basis" for the Village's action and that the action was not a "sham". See, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 371, 103 S.Ct. 2161, 2170 (1983). (There has never been an allegation, nor even a suggestion, that the Village's complaint contained any false allegations of fact). Moreover, any Village official could have reasonably concluded that there was some "realistic chance" that the Village's legal theory "might be adopted". *Id.*, 103 S.Ct. at 2172. (Although, after the fact, the Illinois Appellate Court wrongly concluded that the Village's claims for damages were a "sham", the Cross-Respondents never presented a single case to the Circuit Court or the Appellate Court which stood for the contention that the conditional privilege possessed by an attorney insulates his clients from liability for the clients' tortious conduct). The point is that, taking into account the then existing state of the law, a Village official could have reasonably concluded that the Village's action was lawful, even if it had been brought, as alleged, with a retaliatory intent. *Id.*, 103 S.Ct. at 2170.

It is submitted that any Village official could have reasonably concluded that the Village's alleged threatened lawsuit, and its lawsuit filed on January 5, 1993 would have no actual chilling effect on the Cross-Respondents' claimed right of access to the court, because the Cross-Respondents could have reasonably been expected to assert their (baseless) challenge to the Special Service Area as a counterclaim in the Circuit Court of Lake County.

Because any First Amendment right at issue herein involves balancing the respective interests of the parties, Cross-Petitioner James P. Bateman is entitled to be clothed with the broad, wide net of qualified immunity, applying the purely objective standard of the immunity, as required under *Harlow*.

## CONCLUSION

For the foregoing reasons, this Court should grant this Cross-Petition, as this Court has jurisdiction to do so under the collateral order doctrine as set forth in *Mitchell v. Forsyth*, *supra*. The requested writ must be issued in order to insure that the courts of Illinois, and all other states, do not contravene this Court's holding in *Harlow v. Fitzgerald*, *supra*, by injecting a subjective component into the question of official, qualified immunity.

Respectfully submitted,

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App. 1

[Filed July 28, 1993]

State of Illinois
County of Lake—ss

IN THE CIRCUIT COURT FOR THE 19TH JUDICIAL CIRCUIT LAKE COUNTY, ILLINOIS

No. 93 MR 11

VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Plaintiffs,

v.

MARY E. HOGAN, COLE TAYLOR BANK, as Trustee Under Trust No. 77-432 dated December 19, 1977, SAM LOIACONO and RUTH LOIACONO, and UNKNOWN OWNERS,

Defendants,

MARY E. HOGAN, SAM LOIACONO and RUTH LOIACONO,

Counter-Plaintiffs and Third-Party Plaintiffs,

v.

VILLAGE OF LAKE BARRINGTON, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Counter-Defendants,

and

NANCY SMITH and JAMES P. BATEMAN,

Third-Party Defendants.

## FIRST AMENDED COUNTER-COMPLAINT AND THIRD-PARTY COMPLAINT

MARY E. HOGAN, SAM LOIACONO and RUTH LOIACONO, Counter-Plaintiffs and Third-Party Plaintiffs by their attorneys, PAUL H. STACEY and DANIEL P. FIELD, for their Counter-Complaint against VILLAGE OF LAKE BARRINGTON, a Municipal Corporation, and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE and for their Third-Party Complaint against NANCY SMITH and JAMES P. BATEMAN, allege and state as follows:

### COUNT I

1. Counter-Plaintiff and Third-Party Plaintiff, MARY E. HOGAN (HOGAN) also known as MARY HANRAHAN, is the owner of the beneficial interest in a land trust which consists of property located within the VILLAGE OF LAKE BARRINGTON and in particular within an area of the VILLAGE known as the LAKE BARRINGTON BUSINESS AND INDUSTRIAL PARK and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE.

2. SAM LOIACONO and RUTH LOIACONO (LOIACONOS) are the owners of property located within the VILLAGE OF LAKE BARRINGTON and in particular within an area of the VILLAGE known as the LAKE BARRINGTON BUSINESS AND INDUSTRIAL PARK and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE.

3. The VILLAGE OF LAKE BARRINGTON (VILLAGE) is a municipal corporation located within the

County of Lake, State of Illinois which is organized and exists pursuant to the laws of the State of Illinois.

4. The VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE SPECIAL SERVICE AREA purports to be a specific service area created by the Counter-Defendant, VILLAGE OF LAKE BARRINGTON, in accordance with the laws of the State of Illinois.

5. Third-Party Defendant, NANCY SMITH (SMITH), was, at all relevant times, the president of the VILLAGE OF LAKE BARRINGTON and is being sued in this action solely in her individual capacity for her conduct which was performed under color of state law in the scope of her position as an officer of the Village.

6. Third-Party Defendant, JAMES P. BATEMAN (BATEMAN), was, at all relevant times, the duly appointed corporation counsel for the VILLAGE OF LAKE BARRINGTON and is being sued in this action solely in his individual capacity for his conduct which was performed under color of state law in the scope of her position as an officer of the Village.

7. On July 7, 1992 and October 20, 1992, Counter-Defendant, VILLAGE, enacted Ordinances which purport to establish Counter-Defendant, SPECIAL SERVICE AREA NUMBER THREE.

8. Thereafter, on November 17, 1992, Counter-Defendant, VILLAGE, enacted an Ordinance which provides that SIX MILLION DOLLARS ($6,000,000.00) be spent to improve the area known as the SPECIAL SERVICE AREA NUMBER THREE by installing sewer and water lines and requiring that the property owners, including Counter-Plaintiffs and Third-Party Plaintiffs, be taxed to retire the indebtedness of said improvements.

9. Certain owners of property within the purported SPECIAL SERVICE AREA, including HOGAN and LOIACONO, voiced objections to the need for the services to be provided and the procedure employed by Counter-Defendant, VILLAGE, to create the SPECIAL SERVICE AREA and suggested that a suit might be filed in the Circuit Court of Lake County to contest the validity of the Ordinances which purported to create the SPECIAL SERVICE AREA.

10. HOGAN, LOIACONOS and other property owners within the purported SPECIAL SERVICE AREA retained an attorney, JAMES P. HECHT (HECHT) to counsel them and directed HECHT to institute proceedings in the Circuit Court of Lake County to peaceably determine the validity of the questioned ordinances.

11. HECHT, after evaluating the factual circumstances of the case, prepared a Complaint to be filed on behalf of HOGAN, LOIACONOS and others seeking an injunction against the VILLAGE and SPECIAL SERVICE AREA and a declaration that the ordinances in question were invalid, a copy of which is attached hereto as Exhibit 1.

12. HECHT also, pursuant to 735 ILCS 5/18-102 wrote to the State's Attorney of Lake County and the Attorney General of the State of Illinois requesting that each bring a quo warranto proceeding against the VILLAGE and SPECIAL SERVICE AREA or alternatively to expressly refuse to bring said action thus enabling HECHT to file such an action in the name of his clients, copies of which are attached hereto as Exhibits 2 and 3.

13. Sometime prior to December 9, 1992, HECHT advised BATEMAN that a suit would be filed to contest the validity of the ordinances.

14. Thereafter, BATEMAN and SMITH met in their respective roles as officers of the VILLAGE and agreed that HOGAN and LOIACONOS and the other property owners represented by HECHT should be dissuaded by any means available from filing said lawsuit.

15. At the time said agreement was reached between BATEMAN and SMITH, it was clearly established that HOGAN and LOIACONOS had rights vested in them by the First Amendment to the United States Constitution enforceable against BATEMAN and SMITH through the Fourteenth Amendment of said Constitution of access to the Courts, to petition for redress of grievances, to speak out on matters of public concern and to criticize governmental actions and officials.

16. Notwithstanding the aforesaid rights secured to HOGAN and LOIACONOS by the United States Constitution, BATEMAN and SMITH agreed and in doing so conspired together to threaten HOGAN, LOIACONOS and the other property owners with a suit praying for SIX MILLION DOLLARS ($6,000,000.00) in damages against them if they sought a judicial determination of the validity of the questioned ordinances.

17. BATEMAN and SMITH further conspired against HOGAN and LOIACONOS by agreeing that even if no suit testing the validity of the ordinances was filed, a damages action would still be filed by them on behalf of the VILLAGE and SPECIAL SERVICE AREA against HOGAN and LOIACONOS unless, HOGAN, LOIACONOS and HECHT's other clients, whose identity was at that time unknown to BATEMAN and SMITH, expressly agreed to forebear the exercise and thereby waive their aforesaid constitutional rights.

18. Sometime prior to December 9, 1992, BATEMAN advised HECHT that if HOGAN and LOIACONOS and HECHT's other clients sought a judicial determination of the validity of the aforesaid ordinances that BATEMAN was authorized by SMITH, the VILLAGE and the SPECIAL SERVICE AREA to file an action for damages against HOGAN and LOIACONOS.

19. Thereafter, on December 9, 1992, HECHT met with HOGAN and LOIACONOS and provided them with a copy of a Complaint (Exhibit 1) which HECHT had prepared for filing to test the validity of said ordinances, explained the legal basis for the Complaint and advised HOGAN and LOIACONOS of the threat of damages litigation to be brought against them by BATEMAN and SMITH on behalf of the VILLAGE and SPECIAL SERVICE AREA should they proceed with their suit testing the validity of the questioned ordinances.

20. The next day, HOGAN advised HECHT that she would not lend her name to the suit HECHT was about to file on her behalf in light of her belief, as a result of the threat made by BATEMAN, that she could be exposed to a judgment of as much as SIX MILLION DOLLARS ($6,000,000.00) in damages to the VILLAGE and the SPECIAL SERVICE AREA should she proceed with her lawsuit.

21. LOIACONOS also advised HECHT not to file the Complaint at that time for fear of a judgment for damages being imposed against them which fear was the direct and proximate result of the threat made to HECHT by BATEMAN to file such an action.

22. Thereafter, HECHT received the requested denials from the State's Attorney of Lake County and

Attorney General of the State of Illinois of his request that they bring an action in quo warranto against the VILLAGE, thus, affording HOGAN and LOIACONOS standing to bring such an action in their own name.

23. Notwithstanding this development, HOGAN and LOIACONOS, due solely to the threat made against them by BATEMAN of a damages action should they contest the validity of said ordinances, directed HECHT not to file an action in quo warranto at that time.

24. On December 17, 1992, BATEMAN, in furtherance of his agreement with SMITH to prevent HOGAN and LOIACONOS from filing suit, called HECHT and demanded that HECHT reveal the names of all of his clients who sought to challenge the validity of the ordinances, stating that he already knew that HOGAN was a HECHT client and that if HECHT did not reveal the names of the others that BATEMAN would "use his own ways" to discover their identities and would sue them all for damages on behalf of the VILLAGE unless each of them assured that they would undertake no efforts to challenge the ordinances.

25. Later that date, BATEMAN once again called HECHT and advised him that he had talked to SMITH and that SMITH had told BATEMAN that she was willing to meet with HECHT to discuss compromising the competing interests.

26. HECHT advised HOGAN and LOIACONOS that they should consider meeting with SMITH as the alternative was to defend the threatened claim of the VILLAGE for damages.

27. Thereafter, HECHT arranged to meet with BATEMAN and SMITH on Monday, December 21, 1992 at 5:00 p.m. at BATEMAN's office to discuss this matter.

28. Late on December 17, 1992, BATEMAN called HECHT and advised him that SMITH would only attend such a meeting if all of HECHT's clients were personally present.

29. The demand that all of HECHT's clients attend said meeting was an attempt by SMITH and BATEMAN to ascertain the identity of HECHT's clients so that they could be named in the damages action they intended to file.

30. On December 18, 1992, BATEMAN once again called HECHT demanding to be told what HOGAN, LOIACONOS and the others were going to do.

31. HECHT responded by telling BATEMAN that the threatened damages action had caused HOGAN and LOIACONOS to rethink whether or not they were willing to challenge the ordinances.

32. On December 21, 1992, BATEMAN faxed a letter to HECHT demanding to be told within twenty-four hours if HOGAN and the other clients of HECHT's intended to sue, a copy of which is attached hereto as Exhibit 6.

33. On December 22, 1992 at approximately 11:50 a.m., BATEMAN telephoned HECHT and advised him that CHARLES HUG, the bond counsel for the VILLAGE was on the line and demanded to know HECHT's clients' response to the letter of December 21, 1992.

34. HECHT advised BATEMAN that he would respond to him in writing that day.

35. HOGAN and LOIACONOS, as a result of the threats of BATEMAN and SMITH, advised HECHT that in light of the threatened damage claim, they were still uncertain whether or not they were willing to proceed with an action to determine the validity of said ordinances.

36. On December 22, 1992, HECHT responded to BATEMAN by advising him that he had prepared a suit and engaged in preliminary quo warranto matters, but as a result of his threats to sue HOGAN, LOIACONOS and the others for damages his clients had been "given cause to reconsider" pursuing their action and that BATEMAN's threats presented a dilemma to HOGAN and LOIACONOS, a copy of said letter is attached hereto as Exhibit 7.

37. On December 24, 1992 December 30, 1992, HOGAN and LOIACONOS were again advised by HECHT of BATEMAN's threats to sue them and that said threats to sue HECHT as well presented a conflict of interest which would preclude HECHT from defending HOGAN and LOIACONOS in the event such a suit was filed.

38. Once again, in reaction to the threats of BATEMAN and SMITH, HOGAN and LOIACONOS directed HECHT to undertake no action to ascertain the validity of the ordinances in question.

39. Thereafter, on January 5, 1993, Counter-Defendants, VILLAGE and the SPECIAL SERVICE AREA and Third-Party Defendants, SMITH and BATEMAN, carried out their threats by filing in the Circuit Court of Lake County an action for damages against HOGAN and LOIACONOS which action in essence alleged that

HOGAN and LOIACONOS were liable in tort to the VILLAGE and the SPECIAL SERVICE AREA for threatening to seek a judicial determination of the validity of the Ordinances aforesaid.

40. This lawsuit was filed at the express direction of and with the approval of Third-Party Defendants, SMITH and BATEMAN.

41. The filing of said lawsuit has been ratified by the Defendants, VILLAGE and SPECIAL SERVICE AREA, which continued to maintain said lawsuit and filed an Amended Complaint in Response to the Dismissal by this Court of the original Complaint.

42. The threats made against HOGAN and LOIACONOS should they seek a judicial determination of the validity of the ordinances which purport to create the SPECIAL SERVICE AREA and the filing of this lawsuit are all actions which are done under color of law of the State of Illinois.

43. The acts of the VILLAGE, SPECIAL SERVICE AREA, SMITH and BATEMAN, in threatening HOGAN and LOIACONO with litigation should they question the validity of said Ordinances or seek to petition this Court for redress of grievances had an actual chilling effect on the right secured to HOGAN and LOIACONOS of access to the Courts for and to petition redress of wrongs secured to HOGAN and LOIACONOS by the First Amendment to the United States Constitution made applicable to the VILLAGE, its SPECIAL SERVICE AREA and its President and Attorney by the Fourteenth Amendment to the United States Constitution.

44. The filing of the instant lawsuit is in retaliation against HOGAN and LOIACONOS for professing a

desire to exercise their rights aforesaid secured to them by the First and Fourteenth Amendments to the United States Constitution.

45. This action is brought pursuant to 42 U.S.C., Sec. 1983 which confers jurisdiction on this Court concurrently with the Courts of the United States.

46. HOGAN and LOIACONOS have sustained damages as a result of the attempts by Counter-Defendants and Third-Party Defendants to deprive them of their First Amendment rights.

47. Counter and Third-Party Plaintiffs, HOGAN and LOIACONOS, seek a declaration from this Court that the threats of litigation made in December of 1992 and the filing of this lawsuit in January of 1993 served to deprive them of their First Amendment rights to petition the Court for redress of wrongs and of access to the Courts and that such threats and action in filing this suit are illegal.

48. That the acts of Counter-Defendants and Third-Party Defendants of threatening Plaintiffs with litigation and, in fact, filing suit against them are done intentionally and with the express purpose of deterring Plaintiffs from seeking a judicial determination of the validity of the acts of the VILLAGE which purport to create said SPECIAL SERVICE AREA and are, therefore, actionable under Sec. 1983.

WHEREFORE, Counter-Plaintiffs and Third-Party Plaintiffs pray that this Court enter its Order granting them the following relief:

A. Compensatory damages against the Counter-Defendants and Third-Party Defendants in an amount in ex-

cess of the jurisdictional limit of the Law Division of the Circuit Court of Lake County.

B. Punitive damages against Third-Party Defendants, NANCY SMITH and JAMES P. BATEMAN, in their individual capacities, in the amount of ONE MILLION DOLLARS ($1,000,000.00).

C. A declaration that the acts of Counter-Defendants and Third-Party Defendants in threatening a suit for damages against Counter and Third-Party Plaintiff and, in fact, instituting such suit contravenes the rights secured to Counter and Third-Party Plaintiffs under the First and Fourteenth Amendments to the United States Constitution to petition the Court for redress of wrongs.

D. Attorney's fees pursuant to 42 U.S.C. Sec. 1988 as well as other costs of suit.

E. Such other relief as this Court deems just and fit.

COUNT II

1-8. These Counter and Third-Party Plaintiffs reallege as Paragraphs One through Eight of this Count II those allegations previously set forth as Paragraphs One through Eight of Count I as though fully set forth herein.

9. That the acts of Counter-Defendants in creating said SPECIAL SERVICE AREA in such a fashion as it includes only the property contained in LAKE BARRINGTON BUSINESS AND INDUSTRIAL PARK and excluding all residential and other areas within the VILLAGE OF LAKE BARRINGTON is arbitrary and without rational basis in fact.

10. That the action of said Counter-Defendants discriminates against the owners of business property in

that they have been selected for disparate treatment from the owners of other property within the VILLAGE.

11. The treatment of said property owners affected by the creation of the SPECIAL SERVICE AREA is unreasonable and without a rational basis in fact as residential properties are far greater users of water and sewage than are the commercial users affected by the Ordinance yet those properties will not be taxed nor required to tie into new water and sewer systems.

12. That the acts of Counter-Defendants purposefully and intentionally discriminates against the class of property owners including Counter-Plaintiffs which own commercial property by unlawfully placing an increased financial burden upon them and not on other classes of property for the creation of improvements which are unnecessary.

13. That by enacting said Ordinances, Counter-Defendants have denied Counter-Plaintiffs equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

14. In particular, the territory of the SPECIAL SERVICE AREA excludes therefrom parcels of land that otherwise have a rational relationship to the purpose for which the SPECIAL SERVICE AREA is purportedly created, are contiguous to parcels of land within the territory and some of said excluded parcels are improved and occupied and have septic systems that could be replaced by sanitary sewer services and water presently planned for this SPECIAL SERVICE AREA and that otherwise could be served by the services presently planned to be provided by the SPECIAL SERVICE AREA but are improved by residential structures rather than commercial or retail structures.

15. At least two of these excluded parcels are completely surrounded on all sides by parcels of land which are included within the SPECIAL SERVICE AREA but do not include residences.

16. The purpose of Counter-Defendants in excluding these parcels of land is that they contain sufficient electors who have voiced opposition to the plan as to enable them to join with Counter-Plaintiffs to employ statutory devices to defeat the creation of the SPECIAL SERVICE AREA.

17. There is also excluded from said SPECIAL SERVICE AREA certain parcels of land which are adjacent to the SPECIAL SERVICE AREA and are to be developed with residential structures which could benefit from the services which the SPECIAL SERVICE AREA was purportedly created to provide.

18. There is no rational basis for excluding these parcels of land which has the effect also of excluding the aggregate sum of at least $234,070.00 from the total assessed valuation of the SPECIAL SERVICE AREA as determined for the year 1992 other than to assure that any efforts undertaken by Counter-Defendants to employ the statutory mechanism to defeat the SPECIAL SERVICE AREA will be unsuccessful.

19. The SPECIAL SERVICE AREA was purportedly created to provide greater safety to the structures within its boundaries by providing a water supply to be employed in the event of fire yet those structures within the outer boundaries of the SPECIAL SERVICE AREA where individuals will be found both day and night are excluded from the SPECIAL SERVICE AREA and, thus, will be deprived of the benefits provided by the improvements planned therein.

WHEREFORE, Counter-Plaintiffs pray that this Court enter its Order granting relief as follows:

A. Declaring said Ordinances which purport to create VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE and to levy any taxes in support thereof to be void and unconstitutional.

B. Award Counter-Plaintiffs damages sustained as a result of the enactment of said Ordinances.

C. Award Attorney's fees pursuant to 42 U.S.C., Sec. 1988 as well as other costs of suit.

D. Such other relief as may be just and proper.

Respectfully Submitted,

MARY HOGAN, SAM LOIACONO and RUTH LOIACONO, Counter-Plaintiffs and Third-Party Plaintiffs

By: _____
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[EXHIBITS OMITTED DURING PRINTING]

[Filed Sept. 10, 1993]

State of Illinois
County of Lake—ss

IN THE CIRCUIT COURT FOR THE 19TH JUDICIAL CIRCUIT LAKE COUNTY, ILLINOIS

No. 93 MR 11

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Plaintiffs,

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Defendants,

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MARY E. HOGAN, SAM LOIACONO and RUTH LOIACONO,

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v.

VILLAGE OF LAKE BARRINGTON, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Counter-Defendants,

and

NANCY SMITH and JAMES P. BATEMAN,

Third-Party Defendants.

## MOTION TO DISMISS FIRST AMENDED COUNTER-COMPLAINT AND THIRD-PARTY COMPLAINT

NOW COMES the Third-Party Defendant, JAMES P. BATEMAN, by and through his attorneys, O'REILLY, CUNNINGHAM, NORTON & MANCINI, and moves this Honorable Court pursuant to Sections 5/2-615, 5/2-619(9) and 5/2-1115 of the *Code of Civil Procedure of the State of Illinois*, to dismiss the Third-Party Complaint filed by MARY E. HOGAN, SAM LOIACONO and RUTH LOIACONO, against him, and in support thereof, states as follows:

### INTRODUCTION

1. That Count I of the First Amended Counter-Complaint and Third-Party Complaint filed by MARY E. HOGAN, SAM LOIACONO and RUTH LOIACONO (hereinafter referred to as "Third-Party Plaintiffs"), contravenes Section 5/2-615 of the *Code of Civil Procedure of the State of Illinois* in that it is substantially insufficient in law and is barred by other affirmative matter pursuant to Section 5/2-619 of the *Code of Civil Procedure of the State of Illinois* in the following respects:

A. That Count I of the First Amended Counter-Complaint and Third-Party Complaint sets forth no actionable First Amendment claim against the Third-Party Defendant, JAMES P. BATEMAN, since JAMES P. BATEMAN was acting as the Village Attorney of the Village of Lake Barrington and, as a Village official, clearly possessed the right, under the First Amendment, to petition the Court for redress of this grievance. As such, the act of petitioning the Court, or any statements that the Third-Party Defendant, as Village Attorney of the Village

of Lake Barrington, intended to take such action on behalf of the Village and the Special Service Area were privileged and not actionable as a matter of law.

B. Importantly, JAMES P. BATEMAN, as a public official, acting under color of law was clothed with a qualified immunity from actions such as this. The Third-Party Plaintiffs have failed to allege any facts sufficient to overcome the qualified immunity extended to JAMES P. BATEMAN, as Village Attorney for the Village of Lake Barrington, under well-settled case law of the United States Supreme Court and, therefore, the First Amended Counter-Complaint and Third-Party Complaint is substantially insufficient as a matter of law and should be dismissed.

C. Further, Count I of the First Amended Counter-Complaint and Third-Party Complaint fails to set forth any facts establishing, objectively, that the Third-Party Plaintiffs have been deprived of any substantial liberty under the First Amendment, as is required to sustain an action brought pursuant to 42 U.S.C., Section 1983.

2. That Count I of the First Amended Counter-Complaint and Third-Party Complaint, in its prayer for relief, at Paragraph B, seeks punitive damages against JAMES P. BATEMAN, which prayer for relief contravenes Section 5/2-115 of the *Code of Civil Procedure of the State of Illinois*, since Section 5/2-115, on its face, mandates that punitive damages are not recoverable in cases such as this brought against attorneys.

## ARGUMENT

As has been set forth at length in the brief and argument filed by the VILLAGE OF LAKE BARRINGTON,

the Village and its officials, of whom JAMES P. BATEMAN is one, having admittedly been joined by the Third-Party Plaintiffs in this matter for his acts as a Village official, have an absolute First Amendment right to petition this Court for redress of grievances.

The Third-Party Defendant will not burden this Court by restating the cases and arguments set forth by the VILLAGE OF LAKE BARRINGTON, but adopts these arguments and reiterates the Village's referral of the Court to the case of *Stearn v. United States Gypsum, Inc.*, 547 F.2d 1329, as well as the cases supportive of the *Noerr-Pennington Doctrine*, i.e., *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965). Nowhere in the *Village of Lake Barrington, et al. v. Mary E. Hogan, et al.* have any facts been set forth and, nowhere in the operative facts of the incident which is the subject of this lawsuit could there be any facts found which would support any claim that the instant lawsuit falls within the "sham" exception to the *Noerr-Pennington Doctrine*.

The simple facts of this case are that JAMES P. BATEMAN, as Village Attorney at the direction of the Village of Lake Barrington, has filed this action seeking a determination of the rights of the VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE as to their ability to create and implement the Special Service Area in question, and to seek redress from the Court with regard to the conduct of the Third-Party Plaintiffs as to their continued efforts to impede the Village in the reasonable exercise of this governmental function.

Acting as the Village Attorney in the foregoing manner, JAMES P. BATEMAN, in addition to functioning in a reasonable manner to exercise the constitutional rights afforded to the VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE, possesses a qualified immunity from suits such as the First Amended Counter-Complaint and Third-Party Complaint for civil damages. This immunity was formulated by the Supreme Court *specifically* with regard to 42 U.S.C. Sec. 1983 claims against governmental officials in the case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The *Harlow* case applies a standard of objective legal reasonableness to a public official's acts and holds that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

In the instant case, JAMES P. BATEMAN comported himself in an objectively legally reasonable fashion, as is born out by the allegations of the First Amended Counter-Complaint and Third-Party Complaint at Paragraphs 26, 27, 31, 35, 36, 37 and 38, the Third-Party Plaintiffs had legal counsel throughout their dealings with JAMES P. BATEMAN. Based upon advice given to them by their legal counsel, Mr. Hecht, which advice apparently reflected the reasonableness and legal efficacy of the actions contemplated by the Counter- and Third-Party Defendants, as communicated by BATEMAN to Hecht, the Third-Party Plaintiffs allegedly considered forbearing from the filing of a lawsuit. Clearly, these admissions in their pleadings by the Third-Party Plaintiffs of the objec-

tive reasonableness of JAMES P. BATEMAN's conduct demonstrate that the Third-Party Defendant is entitled to the qualified immunity extended to him under the *Harlow* case.

Further evidence of the objective legal reasonableness of JAMES P. BATEMAN's conduct is the fact that, while Counts II and III of the Complaint were dismissed by this Court, there was no allegation made or judicial finding that Counts II and III were not brought in good faith or without legal basis. The mere fact that certain counts of the counterclaim have been dismissed by the Court does not evidence that the attorney who brought the case on behalf of the municipality and service area involved was acting outside the standard of objective legal reasonableness.

It is, therefore, entirely appropriate for this Court to dismiss the First Amended Counter-Complaint and Third-Party Complaint as they pertain to JAMES P. BATEMAN at this juncture. As the *Harlow* Court stated:

> "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly establish law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently-applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. . . .

> "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences'." *Harlow v. Fitzgerald*, 457 U.S. at 818-819.

The actions taken by JAMES P. BATEMAN here were legitimate and did not implicate any clearly-established rights of the Third-Party Plaintiffs. The Third-Party Defendant was acting in an objectively reasonable fashion under the law to protect the legitimate interests of the VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE in his discussions with the Third-Party Plaintiffs' attorney and in the filing of the instant lawsuit. No set of facts has been set forth in the First Amended Counter-Complaint and Third-Party Complaint which overcome this immunity and, in fact, the admissions contained in the First Amended Counter-Complaint and Third-Party Complaint actively substantiate the fact that MR. BATEMAN's actions were legitimate and reasonable.

The allegations of the First Amended Counter-Complaint and Third-Party Complaint fail to set forth any factual allegation that any right or liberty has been lost by the alleged forbearance of the Third-Party Plaintiffs from filing their action against the VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE.

As the record in this case reflects, the Complaint in this cause was filed by the VILLAGE OF LAKE BARRINGTON and the Third-Party Defendant on January 5, 1993. An Amended Complaint for Declaratory Judgment and other relief was filed on March 22, 1993, and the Counter-Complaint and Third-Party Complaint was filed on April 15, 1993.

As can be seen from the Court record, the Third-Party Plaintiffs, in Count II of their Amended Counterclaim and Third-Party Complaint have set forth their objections to the creation and implementation of SPECIAL SERVICE AREA NUMBER THREE.

The United States Supreme Court recognized in the case of *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318 (1972) that constitutional claims such as those put forth by the Third-Party Plaintiffs in this case are often inconsequential and subjective. As a consequence, *Laird* requires the showing of *objective* harm or a specific threatened future harm to make a claim such as that put forth by the Third-Party Plaintiffs justiciable.

As can be seen from the allegations of the Complaint, there is no objective harm set forth in the claimed "chill" of the Third-Party Plaintiffs' rights. They now stand before the Court, pleading in Count II of their First Amended Counter-Complaint and Third-Party Complaint the very same allegations they alleged that they would have filed, *ab initio*, in 1992. There has been no loss or deprivation suffered by the Third-Party Plaintiffs in any objective sense caused by the tolling of any Statute of Limitations or the loss of any evidence. Further, there has been no allegation of any *objective* impediment or barring access to the Courts undertaken by JAMES P. BATEMAN. MR. BATEMAN simply advised the Plain-

tiffs' legal counsel of the VILLAGE's and SPECIAL SERVICE AREA's intent to seek redress of its grievances and then proceeded to act upon this intent.

As the Third-Party Plaintiffs have admitted in their pleadings, any forbearance from acting which they exercised was at the advice of their own counsel, Mr. Hecht, apparently in response to the assessment by Mr. Hecht that the intended action on the part of the Village was well-founded, and would result in litigation adverse to the Third-Party Plaintiffs.

The action brought against JAMES P. BATEMAN, albeit defectively brought pursuant to 42 U.S.C. Sec. 1983 for the claimed "chilling effect" on the Third-Party Plaintiffs' First Amendment rights based upon his actions undertaken as Village Attorney for the VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE is, essentially, violative of Section 5/2-1115 of the *Code of Civil Procedure of the State of Illinois* which states:

> "Punitive damages are not recoverable in healing art and legal malpractice cases. In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed."

The language of Section 5/2-1115 of the *Code of Civil Procedure* is all inclusive. Whether this Court considers this matter a tort or an otherwise-brought case, it is clear that the *Code of Civil Procedure of the State of Illinois* forbids the seeking of punitive damages against an attorney for actions arising out of the practice of law.

As the First Amended Counter-Complaint and Third-Party Complaint in this matter states, JAMES P. BATEMAN is being sued in his capacity as the Village Attorney, acting under color of law, for actions he took with regard to contemplated and filed litigation involving the Third-Party Plaintiffs. As such, this case falls within the ambit of Section 5/2-1115 of the *Code of Civil Procedure of the State of Illinois* and Paragraph B of Count I of the First Amended Counter-Complaint and Third-Party Complaint should be dismissed with prejudice.

## CONCLUSION

As can be seen from the foregoing, the First Amended Counter-Complaint and Third-Party Complaint as it applies to JAMES P. BATEMAN and its claimed "chilling" of the Third-Party Plaintiffs' constitutional rights is one of those subjective, inconsequential claims addressed by the United States Supreme Court in its analyses in the *Harlow* and *Laird* cases.

Clearly, this situation, in which individuals who were represented by an attorney, forbore from the filing of litigation based upon statements of intent made by a Village Attorney to file counter-litigation, does not meet the standard required by the Supreme Court, both with regard to a lack of objective legal reasonableness in MR. BATEMAN's actions, or as to an objective harm caused by any delay in presenting the Third-Party Plaintiffs' claims to the Court, these claims are now fully and adequately before the Court in Count II of the First Amended Counter-Complaint and Third-Party Complaint.

These factors, as well as the fact that the Third-Party Plaintiffs seek punitive damages which are clearly not

cognizable against MR. BATEMAN under Illinois law, should fairly demonstrate to this Honorable Court that Count I of the First Amended Counter-Complaint and Third-Party Complaint as to MR. BATEMAN should be dismissed, in its entirety, with prejudice.

Respectfully submitted

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[Filed Nov. 24, 1993]

State of Illinois
County of Lake—ss

IN THE CIRCUIT COURT FOR THE 19TH JUDICIAL CIRCUIT LAKE COUNTY, ILLINOIS

No. 93 MR 11

VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Plaintiffs,

v.

MARY E. HOGAN, COLE TAYLOR BANK, as Trustee Under Trust No. 77-432 dated December 19, 1977, SAM LOIACONO and RUTH LOIACONO, and UNKNOWN OWNERS,

Defendants,

---

MARY E. HOGAN, SAM LOIACONO and RUTH LOIACONO,

Counter-Plaintiffs and Third-Party Plaintiffs,

v.

VILLAGE OF LAKE BARRINGTON, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Counter-Defendants,

and

NANCY SMITH and JAMES P. BATEMAN,

Third-Party Defendants.

ORDER

This cause coming to be heard on the Motion of Village of Lake Barring, Village of Lake Barring Special Service Area Number Three and Nancy Smith to Dismiss Counts I and II of the First Amended Counter-Complaint and Third-Party Complaint, the Court having heard arguments of counsel and examined the pleadings, and memorandum and being fully advised finds as follows:

1. This action is one not involving a municipal government versus the State of Illinois.

2. Lake Barrington is a "person" within the meaning of the Fourteenth Amendment.

3. The *Noerr-Pennington* doctrine is applicable to this case.

4. The First Amended Counter-Complaint and Third-Party Complaint does not clearly state a "sham" exception to the *Noerr-Pennington* doctrine.

WHEREFORE Count I of the First Amended Counter-Complaint and Third-Party Complaint is dismissed with prejudice. The Motion to Dismiss Count II of said Complaint is denied.

ENTER: WILLIAM D. BLOCK
WILLIAM D. BLOCK,
Circuit Judge

Dated in Waukegan, Illinois
this 24th day of November, 1993.

Supreme Court, U.S.
FILED
MAR 22 1996
CLERK

95-1326

No. 95-1325

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

**VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE, NANCY SMITH and JAMES P. BATEMAN,**

*Cross-Petitioners,*

v.

**MARY E. HOGAN, COLE TAYLOR BANK, as Trustee Under Trust No. 77-432 dated December 19, 1977, SAM LOIACONO, RUTH LOIACONO, and LAKE BARRINGTON INDUSTRIAL PARK ASSOCIATION,**

*Cross-Respondents.*

**On Cross-Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District**

## BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

### I.

When a Motion to Dismiss for failure to state a claim upon which relief may be granted is made, is the sufficiency of a Complaint brought pursuant to 42 U.S.C., Sec. 1983 alleging a denial of or a retaliation by a public official of a citizen's right of access to the Courts to be determined by application of the balancing test set forth in *Pickering v. Board of Education of Township High School District No. 205*, 391 U.S. 563 (1968).

### II.

Was it clearly established at the time Cross-Petitioner acted that the acts of Cross-Petitioner in threatening and then filing sanctionable sham litigation to prevent citizens from seeking a judicial determination of the validity of Ordinances imposing a new tax upon them violated Cross-Respondents' Constitutional rights.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED ..... | i |
| TABLE OF AUTHORITIES ..... | iii |
| STATEMENT OF THE CASE ..... | 1 |
| REASONS FOR DENYING THE WRIT: | |
| I. | |
| WHEN A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED IS MADE, IS THE SUFFICIENCY OF A COMPLAINT BROUGHT PURSUANT TO 42 U.S.C., SEC. 1983 ALLEGING A DENIAL OF OR A RETALIATION BY A PUBLIC OFFICIAL OF A CITIZEN'S RIGHT OF ACCESS TO THE COURTS TO BE DETERMINED BY APPLICATION OF THE BALANCING TEST SET FORTH IN *PICKERING v. BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 205*, 391 U.S. 563 (1968) ..... | 6 |
| II. | |
| WAS IT CLEARLY ESTABLISHED AT THE TIME CROSS-PETITIONER ACTED THAT THE ACTS OF CROSS-PETITIONER IN THREATENING AND THEN FILING SANCTIONABLE SHAM LITIGATION TO PREVENT CITIZENS FROM SEEKING A JUDICIAL DETERMINATION OF THE VALIDITY OF ORDINANCES IMPOSING A NEW TAX UPON THEM VIOLATED CROSS-RESPONDENTS' CONSTITUTIONAL RIGHTS ..... | 10 |
| CONCLUSION ..... | 14 |
| CROSS-RESPONDENTS' APPENDIX ..... | R.App. 1 |

## TABLE OF AUTHORITIES


| *Cases* | PAGE |
|---|---|
| *Arlington Heights National Bank v. Arlington Heights Federal Savings and Loan Association*, 37 Ill.2d 546, 229 N.E.2d 514 (1967) | 12 |
| *Ashley v. Scott*, 266 Ill.App.3d 302, 203 Ill.Dec. 757, 640 N.E.2d 677 (2nd Dist., 1994) | 11 |
| *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731 (1983) | 8, 9, 10 |
| *Boddie v. Connecticut*, 401 U.S. 371 (1971) | 6 |
| *Brown v. Allen*, 344 U.S. 443 (1953) | 11 |
| *California Bankers Association v. Schultz*, 416 U.S. 21 (1974) | 11 |
| *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508 (1972) | 9, 13 |
| *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142 (1907) | 9 |
| *Hansen v. Bennett*, 948 F.2d 397 (7th Cir., 1991) | 13 |
| *Harrison v. Springdale Water and Sewer Commission*, 780 F.2d 1422 (8th Cir., 1986) | 13 |
| *King v. Levin*, 184 Ill.App.3d 557, 132 Ill.Dec. 752, 540 N.E.2d 492 (1st Dist., 1989) | 12 |
| *Long v. City of New Boston*, 91 Ill.2d 456, 64 Ill. Dec. 905, 440 N.E.2d 625 (1982) | 6 |
| *Matzker v. Herr*, 748 F.2d 1142 (7th Cir., 1984) | 13 |
| *Pickering v. Board of Education of Township High School District No. 205*, 391 U.S. 563 (1968) | 6, 8 |

*Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. ____, 113 S.Ct. 1920 (1993) ..... 12

*Ray Dancer, Inc. v. The DMC Corporation*, 230 Ill.App.3d 40, 171 Ill.Dec. 824, 594 N.E.2d 1344 (2nd Dist., 1992) ..... 12

*Siegert v. Gilley*, 500 U.S. 226 (1991) ..... 6, 10

*Tarkowski v. County of Lake*, 775 F.2d 173 (7th Cir., 1985) ..... 13

*United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217 (1967) ..... 9

*Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 159 Ill.Dec. 50, 575 N.E.2d 548 (1991) ..... 7

*Wolff v. McDonnell*, 418 U.S. 539 (1974) ..... 9

*Other Authorities*

35 ILCS 230/1 *et seq.* ..... 1

Ill.S.Ct. Rule 137 ..... 4, 11

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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**VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE, NANCY SMITH and JAMES P. BATEMAN,**

*Cross-Petitioners,*

v.

**MARY E. HOGAN, COLE TAYLOR BANK, as Trustee Under Trust No. 77-432 dated December 19, 1977, SAM LOIACONO, RUTH LOIACONO, and LAKE BARRINGTON INDUSTRIAL PARK ASSOCIATION,**

*Cross-Respondents.*

---

**On Cross-Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District**

## BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

## STATEMENT OF THE CASE

### I.

### THE FACTUAL BACKGROUND

The Illinois Legislature has adopted the Special Service Area Tax Act, 35 ILCS 230/1 *et seq*. which allows municipalities in certain circumstances to provide special service to specific geographic areas within their boundaries and to impose taxes to provide for the payment of any debt incurred as a result of the provision of those services. In 1992, the VILLAGE OF LAKE BARRINGTON attempted to create such a Special Service Area to provide an underground municipal water line and sewer system to an area within its corporate limits. On October 20, 1992, the VILLAGE enacted an Ordinance which established the SPECIAL SERVICE AREA. On November 17, 1992, the VILLAGE adopted an Ordinance which provided for the sale of bonds in the aggregate amount of SEVEN MILLION DOLLARS to pay for the proposed improvements within the SPECIAL SERVICE AREA. That Ordinance provided that the bonds would be paid for by taxes imposed against the owners of real property within the SPECIAL SERVICE AREA.

Certain owners of property within the SPECIAL SERVICE AREA, including Cross-Respondents, believed that the VILLAGE had not fully complied with the procedure set forth in the aforementioned statutes in creating the SPECIAL SERVICE AREA. As a result, they hired an attorney to seek a judicial determination of the validity of the Ordinances. The attorney for the Cross-Respondents advised the VILLAGE attorney, Cross-Petitioner, JAMES BATEMAN, that he did not feel the Ordinances were valid. Cross-Petitioner BATEMAN advised this

attorney that should he pursue efforts on behalf of Cross-Respondents BATEMAN would sue Cross-Respondents on behalf of the VILLAGE for damages in an amount equal to the proposed bond issue.

## II.

## THE PROCEEDINGS IN THE COURTS BELOW

On January 5, 1993, Cross-Petitioner, JAMES BATEMAN, filed a two Count Complaint against Cross-Respondents and other unknown owners of real property within the SPECIAL SERVICE AREA. This suit was brought on behalf of the VILLAGE and its SPECIAL SERVICE AREA. Count I sought a declaration of the validity of the SPECIAL SERVICE AREA Ordinances while Count II purported to state a cause of action against Cross-Respondents for tortious interference in the contractual relationship between the VILLAGE and the firm retained to sell its bonds and sought damages in the amount of six million dollars. On March 22, 1993, an Amended three Count Complaint was filed. Count I sought a declaration of the validity of the SPECIAL SERVICE AREA Ordinances. Counts II and III, once again, sought a judgment of six million dollars in damages against Cross-Respondents on theories of tortious interference with contractual relations and tortious interference with prospective economic advantage respectively. Cross-Respondents filed a Counter-Complaint and Third-Party Complaint pursuant to 42 U.S.C., Sec. 1983.

On April 21, 1993, the Trial Court dismissed the damage claims filed by Cross-Petitioner with prejudice stating that "it appearing that no set of facts can be alleged which will be legally sufficient to state a cause of action

for intentional interference with contract or economic expectancy, Defendants' Motions are granted *with prejudice*" (emphasis in original) (R.App. 1).

On July 28, 1993, Cross-Respondents filed their First Amended Counter-Complaint and Third-Party Complaint against Cross-Petitioner, JAMES BATEMAN and others. It is Count I of that Counter and Third-Party Complaint which gives rise to the Cross-Petition for Certiorari.

Count I of the Amended Counter-Complaint and Third-Party Complaint (hereinafter "Complaint") was directed against the VILLAGE and the SPECIAL SERVICE AREA as Counter-Defendants and NANCY SMITH, then the Village President, and Cross-Petitioner, JAMES BATEMAN, the Village attorney, as Third-Party Defendants. Count I was brought pursuant to 42 U.S.C., Sec. 1983 and alleged that upon learning that certain owners of property within the SPECIAL SERVICE AREA had retained counsel and were prepared to file a suit to contest the validity of the Ordinances which created the SPECIAL SERVICE AREA and imposed six million dollars in additional taxes upon the property owners therein, Cross-Petitioner and the other Counter/Third-Party Defendants undertook a course of conduct which was intended to deter the citizens from seeking a judicial determination of the validity of the Ordinances. This course of conduct included threats against those individuals of a multi-million dollar suit for damages unless they agreed, in writing, to forbear the exercise of any right vested in them by the First Amendment to the United States Constitution to challenge the Ordinances and, upon their refusal to do so, culminated in the filing of the aforementioned action for damages.

Count I further alleged that such threats and the filing of the damages action was in retaliation for the statement by Cross-Respondents that they would exercise their right of access to the Courts and their petitioning of the State's Attorney and Attorney General each to bring actions in the nature of Quo Warranto against the VILLAGE and the SPECIAL SERVICE AREA. Such retaliation constituted a deprivation by Cross-Respondent and the others of rights secured to the property owners by the First and Fourteenth Amendments to the United States Constitution and was thus actionable pursuant to 42 U.S.C., Sec. 1983. Count I sought both a declaration that the action of the Cross-Petitioner and others deprived Cross-Respondents of their civil rights and damages for said violations. The Complaint further alleged that as a result of Cross-Petitioner's threats, Cross-Respondents advised their attorney to forbear seeking a judicial determination of the validity of the Ordinances due to their fear that Cross-Petitioner would carry out his threat to sue them for damages. (A copy of Cross-Respondents' First Amended Counter and Third-Party Complaint is included in the Appendix to the Cross-Petition for Writ of Certiorari at pages 1-15.)

On November 24, 1993, the Circuit Court of Lake County, Illinois entered its Order granting Cross-Petitioner's Motion to Dismiss Count I on the basis that the filing of the damages action was protected by the Noerr-Pennington Doctrine and that the allegations of Count I did not clearly state a "sham" exception to that Doctrine (Appendix to Cross-Petition for Writ of Certiorari, P. 28).

However, on August 11, 1994, the Circuit Court granted Cross-Respondents' Motion brought pursuant to Ill.S.Ct. Rule 137 finding that Cross-Petitioner's pur-

ported legal theories advanced in support of the damages action were without any reasonable basis in law or the extension or modification of existing law and that the action was filed without any legitimate purpose but was filed for the purpose of intimidating the Cross-Respondents and imposed sanctions against Cross-Petitioner in the amount of five thousand dollars plus Court costs as a result of said filing (R.App. 3).

Cross-Respondents appealed the Dismissal of Count I of their Complaint to the Illinois Court of Appeals. Cross-Petitioner BATEMAN also appealed the imposition of sanctions against him. In its opinion filed May 2, 1995, the Appellate Court of Illinois reversed the Trial Court Order dismissing Count I of the Complaint against Cross-Petitioner BATEMAN, the VILLAGE and the SPECIAL SERVICE AREA. It affirmed the dismissal of Third-Party Defendant, NANCY SMITH. The Appellate Court also affirmed the Order imposing sanctions against Cross-Petitioner BATEMAN. The Appellate Court found that Cross-Petitioner was not entitled to qualified immunity and that the action for damages he filed against Cross-Respondents constituted sham litigation (Appendix to the Petition for Writ of Certiorari, Case number 95-1097 at pages 1-22).

The Court of Appeals denied Cross-Petitioner's Petition for Rehearing and the Illinois Supreme Court refused to hear the case. This Cross-Petition follows.

## REASONS FOR DENYING THE WRIT

### I.

### WHEN A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED IS MADE, IS THE SUFFICIENCY OF A COMPLAINT BROUGHT PURSUANT TO 42 U.S.C., SEC. 1983 ALLEGING A DENIAL OF OR A RETALIATION BY A PUBLIC OFFICIAL OF A CITIZEN'S RIGHT OF ACCESS TO THE COURTS TO BE DETERMINED BY APPLICATION OF THE BALANCING TEST SET FORTH IN *PICKERING v. BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 205*, 391 U.S. 563 (1968).

Cross-Petitioner asserts that the Court of Appeals did not properly apply either step of the analysis of a claim of qualified immunity established by this Court in *Siegert v. Gilley*, 500 U.S. 226 (1991). The first of those steps is to determine if the allegations of the Complaint set forth facts which, if true, constitute a violation of a constitutional right. Cross-Petitioner asserts that the Court of Appeals erred in its analysis of this first step as it did not apply the balancing test established by this Court in *Pickering v. Board of Education of Township High School District No. 205*, 391 U.S. 563 (1968). He is wrong in several respects.

The first is that the case below was decided on a Motion to Dismiss. Under Illinois law, the facts alleged in the Complaint are admitted by a Motion to Dismiss and must be taken as true, *Long v. City of New Boston*, 91 Ill.2d 456, 64 Ill.Dec. 905, 440 N.E.2d 625 (1982). This Court also assumes on a Motion to Dismiss a Complaint the truth of the allegations in the Complaint, *Boddie v. Connecticut*, 401 U.S. 371, 373 (1971). A Motion to Dismiss for failure to state a cause of action attacks only the legal sufficiency of the Complaint and the only matters

to be considered in ruling on such a Motion are the allegations of the pleadings themselves, *Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 159 Ill.Dec. 50, 57-58, 575 N.E.2d 548, 555-56 (1991). The only question presented is whether sufficient facts are contained in the record which, if proved, would entitle Cross-Respondents to relief, *id*. It is equally well established that evidentiary material outside the Complaint may not be considered in ruling on such a Motion, *id*. The only consideration is whether the allegations of Count I of the First Amended Counter and Third-Party Complaint state a legally sufficient cause of action against Cross-Petitioner, *id*.

It follows that the Cross-Petitioner's gratuitous recitation in his Statement of the Case and Argument of all the work and expense that his client had invested in the project before it enacted the Ordinances in question is irrelevant. Cross-Petitioner is arguing that *Pickering* requires the conclusion that the investment by the VILLAGE of significant time and resources in the improvements to the SPECIAL SERVICE AREA prior to the time it enacted the Ordinances in question outweighs Cross-Respondents' right to seek a judicial determination of whether or not the Ordinances which shift the burden of paying those costs onto Cross-Respondents were properly enacted. Yet, none of those facts appear in the Complaint. Under the proper procedural analysis, there are no other facts against which the Court may balance the allegations of the Complaint.

Another flaw in the Cross-Petitioner's reliance on *Pickering* is his mistaken belief that a citizen only enjoys a Constitutionally protected right of access to the Courts if the subject matter of the lawsuit addresses a matter of public concern. This Court has long recognized that the

right of access to the Courts protects private litigation so long as the suit has a reasonable basis in fact, *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731 (1983). This Court noted with approval that the First Amendment interest in private litigation includes compensation for violated rights and interests, the psychological benefits of vindication and the public airing of disputed facts, 461 U.S. at 743. Cross-Petitioner cites no case from this Court or any of the Circuit Courts of Appeal to support his contention that only lawsuits dealing with matters of public concern enjoy constitutional protection.

Cross-Petitioner also ignores the fact that the application of the *Pickering* test is limited to cases involving restrictions on the rights of speech and association of public employees by their governmental employers. This Court in *Pickering* struck a balance between the interest of public employees to comment as citizens on matters of public concern and the sometimes competing interests of public employers in promoting the efficiency of the public services it provides through its employees, 391 U.S. at 568. In doing so, however, this Court recognized that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of speech of the citizenry in general, *id.* Cross-Petitioner now argues that these same considerations enable him to balance the value of the construction project to the VILLAGE against Cross-Respondents' Constitutional rights.

Cross-Petitioner's argument also ignores the fact that the Constitutional right of access to the Courts implicates more than the question of free speech under the First Amendment to the United States Constitution contemplated by *Pickering*. This Court has stated that the

Constitutional right of access to the Courts is part of the greater right to petition government for redress of grievances and is "among the most precious of the liberties safeguarded by the Bill of Rights", see *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). The right to seek judicial redress is indeed grounded in the First Amendment, *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). But this Court has also noted that the right of access to the Courts is founded in the due process clause of the Fourteenth Amendment and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental Constitutional rights, *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

This Court has also viewed the right of access to the Courts as one of the privileges and immunities accorded citizens under Article IV of the Constitution and the Fourteenth Amendment, *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907).

Cross-Petitioner also argues that the Complaint fails to set forth any First Amendment deprivation as no facts are alleged to show an actual objective chilling effect on Cross-Respondents' protected activities. This assertion ignores the recognition by this Court that threats to and the filing of a lawsuit have a substantial chilling effect upon a citizen's willingness to engage in protected activities, *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 734 (1983). The acts of Cross-Petitioner put Cross-Respondents on notice that if they attempted to contest the VILLAGE'S action, they were subjecting themselves to the possibility of a burdensome suit. Regardless of how unmeritorious the suit was, Cross-Re-

spondents were on notice that they would have to retain counsel and incur substantial legal expenses to defend against it, 461 U.S. at 740. This Court has also recognized that the chilling effect of threatened and actual litigation is significantly multiplied where the Complaint seeks damages in addition to non-economic relief, 461 U.S. at 741. Such was the case herein. Cross-Petitioner's argument ignores that this Court has expressly noted that a lawsuit may be used as a powerful instrument of coercion or retaliation, 461 U.S. at 740.

The allegations of Count I of Cross-Respondents' Counter and Third-Party Complaint against Cross-Petitioner adequately set forth a deprivation of their right of access to the Courts.

## II.

## WAS IT CLEARLY ESTABLISHED AT THE TIME CROSS-PETITIONER ACTED THAT THE ACTS OF CROSS-PETITIONER IN THREATENING AND THEN FILING SANCTIONABLE SHAM LITIGATION TO PREVENT CITIZENS FROM SEEKING A JUDICIAL DETERMINATION OF THE VALIDITY OF ORDINANCES IMPOSING A NEW TAX UPON THEM VIOLATED CROSS-RESPONDENTS' CONSTITUTIONAL RIGHTS.

Once the Court finds that a Complaint adequately sets forth a Constitutional deprivation, the second prong of the *Siegert* test of qualified immunity requires the Court to determine if the Constitutional standards were clearly established at the time of the Defendant's action, 500 U.S. at 232.

Cross-Respondents agree with Cross-Petitioner that the Illinois Court of Appeals wrongly applied a subjective standard in its resolution of the issue of qualified im-

munity. In doing so, it improperly found that Third-Party Defendant, NANCY SMITH, the Village President, was entitled to qualified immunity due to the fact that she simply relied upon advice she received from Cross-Petitioner. While the Illinois Court of Appeals may have used the wrong analysis in its resolution of the issue of qualified immunity, it achieved the correct result in the case of Cross-Petitioner BATEMAN. Cross-Respondents are free to urge in this Court reasons for affirming the judgment of the Court of Appeals which may not have been relied upon by that Court, *California Bankers Association v. Schultz*, 416 U.S. 21, 72 (1974). In review of judicial proceedings, the rule is well settled that if the decision below is correct, it must be affirmed although the lower Court relied upon a wrong ground or gave a wrong reason for its decision, *Brown v. Allen*, 344 U.S. 443, 459 (1953).

The Court of Appeals was correct in finding that the damages action filed by Cross-Petitioner against Cross-Respondents was not only sham litigation but it was sanctionable under a Rule of the Illinois Supreme Court governing the filing of lawsuits which are not well grounded in either fact or law, Ill.S.Ct. Rule 137. The purpose of the Rule is to punish attorneys who plead frivolous or false matters or bring suit without any basis in law, *Ashley v. Scott*, 266 Ill.App.3d 302, 203 Ill.Dec. 757, 759, 640 N.E.2d 677, 679 (2nd Dist., 1994). Cross-Respondents submit that it was clearly established at the time Cross-Petitioner acted that the filing of a lawsuit in contravention of Ill.S.Ct. Rule 137 was not objectively reasonable. This Court has recently ruled that "sham" litigation is that which is objectively baseless in the sense that no reasonable litigant could realistically

expect success on the merits, *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. ___, 113 S.Ct. 1920, 1928 (1993). Conduct which is sanctionable is objectively unreasonable and thus constitutes a sham.

The Trial Court expressly held that Cross-Petitioner filed a damages action for an improper purpose (R.App. 3). The Court of Appeals affirmed this decision. This conclusively establishes that Cross-Petitioner filed a baseless lawsuit to conceal an attempt to directly interfere with the interests of Cross-Respondents, see, *Professional Real Estate Investors*, 113 S.Ct. at 1928.

At the time Cross-Petitioner threatened to and did in fact file a suit for damages against Cross-Respondents, it was clearly established in Illinois that Cross-Respondents were vested with a conditional privilege to file a lawsuit seeking a judicial determination of the validity of the Ordinances in question as individual citizens enjoy such a privilege in actions before judicial bodies in this State, *Arlington Heights National Bank v. Arlington Heights Federal Savings and Loan Association*, 37 Ill.2d 546, 229 N.E.2d 514, 517-18 (1967).

Illinois Courts had also recognized the illegality of filing a lawsuit, the purpose of which is not to seek favorable action from the Courts, but rather to injure an opponent in the exercise of rights secured to him, *King v. Levin*, 184 Ill.App.3d 557, 132 Ill.Dec. 752, 540 N.E.2d 492 (1st Dist., 1989); *Ray Dancer, Inc. v. The DMC Corporation*, 230 Ill.App.3d 40, 171 Ill.Dec. 824, 594 N.E.2d 1344 (2nd Dist., 1992).

Years before he acted, Cross-Petitioner was put on notice by the Seventh Circuit that if a public official

brings a baseless suit designed to deter individuals from enforcing their Federal Constitutional rights, they can be said to be depriving those individuals of those rights and such a deprivation, when done under color of law, is actionable under 42 U.S.C., Sec. 1983, *Tarkowski v. County of Lake*, 775 F.2d 173, 174 (7th Cir., 1985).

It was clearly established at the time Cross-Petitioner acted that if an official retaliates against an individual as a result of that individual's attempt to seek judicial intervention, said conduct contravenes Section 1983, *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir., 1984).

In a case which is closely analogous to this one, the Court had held that where a public body filed an action to condemn private lands in retaliation for a suit which the land owners had previously filed against that public body, a claim was stated pursuant to Section 1983, *Harrison v. Springdale Water and Sewer Commission*, 780 F.2d 1422 (8th Cir., 1986).

It was clearly established at the time Cross-Petitioner acted that a municipal official in Illinois was charged with knowledge of the applicable First Amendment law when dealing with citizens in the community, *Hansen v. Bennett*, 948 F.2d 397, 400 (7th Cir., 1991).

This Court had clearly established that it was illegal to employ judicial bodies by instituting proceedings without probable cause intending to deprive others of meaningful access to the Courts, *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508, 512 (1972).

All but the plainly incompetent would have appreciated the illegality of Cross-Petitioner's conduct and known that by so acting they were breaking the law. The Court below properly determined that he was not entitled to qualified immunity.

## CONCLUSION

The Cross-Petition for a Writ of Certiorari raises no significant Constitutional questions or issues of national importance and claims simply that Cross-Petitioner's case was wrongly decided by the Illinois Court of Appeals. For the foregoing reasons, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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*Attorney for Cross-Respondents*

# CROSS-RESPONDENTS' APPENDIX

STATE OF ILLINOIS
COUNTY OF LAKE–SS

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
LAKE COUNTY, ILLINOIS

Gen. No. 93 MR 11

Village of Lake Barrington, et al.

vs.

Mary E. Hogan, et al.

ORDER

This matter before the Court upon the *Section 2-615 MOTION TO STRIKE COUNTS II AND III* of Plaintiff's *AMENDED COMPLAINT*, due notice having been given, and the Court being advised in the premises, it is hereby *ORDERED*: 1. The conditional privilege afforded to attorneys in the course of representing their clients is hereby expressly extended to the clients; 2. Counts II and III fail to contain averments from which an inference of "actual malice" may be drawn and Defendants' *Section 2-615 MOTION* is therefore *granted*; 3. It appearing that no set of facts can be alleged which will be legally sufficient to state a cause of action for intentional interference with contract or economic expectancy, Defendants' *MOTIONS* are granted *with prejudice*; 4. Leave is granted for Defendants to file their counterclaim and Third-party Complaint *instanter*; 5. The *Motion* of Cole-Taylor Bank to Strike Counts II and III is *granted*;

6. Plaintiffs' request for a S. Ct. Rule 304(a) finding is *denied.*

Dated at Waukegan, Illinois this
21st day of April 1993.

ENTER:

William D. Block
Judge

STATE OF ILLINOIS
COUNTY OF LAKE—SS

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
LAKE COUNTY, ILLINOIS

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Gen. No. 93 MR 11

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Village of Lake Barrington, et al.

Plaintiffs

vs.

Mary E. Hogan, et al.

Defendants

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ORDER

This matter before the Court upon Defendants' *MOTION FOR SANCTIONS*; due notice having been given, argument and proofs having been heard, and the Court being advised in the premises, the Court hereby FINDS:

1. The purported legal theories embodied in Plaintiffs' interference with contract/economic advantage Counts are without any reasonable basis in law or the extension or modification of existing law; 2. The filing of the tort claims was without any legitimate purpose; rather the claims were filed for the purpose of intimidating the Defendants. It is thus hereby ORDERED: 1. The *MOTION FOR SANCTIONS* is hereby *granted*; 2. Judgment is entered in favor of Defendants HOGAN, RUTH LOIACONO and SAM LOIACONO in the amount of $5,000.00 plus court

costs, and against the Plaintiffs and JAMES P. BATEMAN; 3. BATEMAN may post a personal $10,000.00 surety bond as an appeal bond & which, upon filing, shall stay this judgment; 4. The Village need not file a bond to stay this judgment.

Dated at Waukegan, Illinois this
11th day of August 1994.

ENTER:

William D. Block
Judge